

**Concurring Statement of Commissioner J. Thomas Rosch
In the Matter of POM Wonderful**

Docket No. 9344

January 10, 2013

The Commission Opinion states that “[t]here are two analytical routes by which Complaint Counsel can prove that Respondents’ ads are deceptive or misleading and both arise in this case.” Commission Opn. at 17. The first is to demonstrate that the claims in the ads are false. The second approach relies on the “reasonable basis” theory; that is, that an objective claim about a product’s performance or efficacy carries with it a representation that the advertiser had a reasonable basis of support for the claim. *Id.* I agree with these assertions.

Using this framework, the Commission Opinion separately analyzes the efficacy claims and the level of substantiation claimed by those advertisements. More specifically, the Commission first determines for itself whether and to what extent the ads make efficacy claims (*see, e.g., id.* at 9); but the Commission relies on extrinsic evidence (the testimony of experts) to determine the level of substantiation required to support the c

Inc. v. FTC, 970 F.2d 311, 319 (7th Cir. 1992);¹ accord *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1189-90 n.12 (N.D. Ga. 2008); see also *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965).

Second, neither *Kraft* nor *Colgate-Palmolive* contains any suggestion that the Commission itself lacks the common sense and expertise to determine whether any false substantiation claims are conveyed by the ads, as part of its examination of the ads' net impression. Nor do other case

¹ It is worth noting that all of the appellate authority respecting the need for the Commission to consider expert opinions *predates* the *Kraft* case.

the net impression that the highest form of substantiation exists to support the claims linking POM to the treatment, prevention or reduction of risk from these serious diseases.

Fourth, I do not consider erectile dysfunction to be as serious as heart disease or prostate cancer. For example, while erectile dysfunction afflicts many men, it is generally not life-threatening. Thus, I do not think that linking POM with the treatment, prevention or reduction of risk of erectile dysfunction, standing alone, creates a net impression that claims respecting that malady are supported by the highest level of substantiation. But that does not mean the Commission Opinion is wrong in requiring that level of substantiation for erectile dysfunction as well. The Commission has long considered so-called “establishment” claims to be binding on the advertisers that make them. *See* 11 F.3d 1200 (1994) (the Commission does not think that